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# In the Supreme Court of the United States

OCTOBER TERM, 1978

**No. 78-663**

BOROUGH OF FOX CHAPEL, WILLIAM A. JONES and KATHERINE P. JONES, HAROLD H. HAMMER and HANNAH R. HAMMER,

*Appellants*

vs.

JOHN A. FRIDAY,

*Respondent*

ON APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA

## Motion to Dismiss Appeal for Lack of Jurisdiction

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On Appeal from the Supreme Court of Pennsylvania

## Motion to Dismiss Appeal for Lack of Jurisdiction

*May it please the Court:*

### I. OBJECT

The object of this motion is to dismiss Appellants' appeal in this case as not being within the jurisdiction of the United States Supreme Court, for the following reasons: The appeal does not present a substantial federal question. The federal question sought to be reviewed was not properly raised or expressly passed upon and the appeal is not taken in conformity to 28 U.S.C. 1257(2). The judgment of the Pennsylvania Court rests on an adequate non-federal basis. The

reasons for the appeal are fictitious and frivolous. The appeal requests a review by the United States Supreme Court on grounds so general and so vague as to constitute merely a request to second-guess the Pennsylvania Court on the merits of the case and to make a reply by Respondent on specific questions of Federal constitutional law impossible. Finally, there being no good reason in law or facts of this appeal, allowance of Appellants jurisidiction in this case would waste time, effort and expense on an already overcrowded docket. Further, the object of this motion is to move that all costs of this appeal be assessed against Appellants.

**II. THE APPEAL IS NOT TAKEN IN CONFORMITY TO 28 U.S.C. 1257(2)**

**and**

**THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NOT PROPERLY RAISED OR EXPRESSLY PASSED UPON.**

The appeal is not within the jurisdiction of this Court because it is not taken in conformity with 28 U.S.C. 1257(2) which states:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> • • •"

Appellants expressly rely on this statute as the sole basis for this appeal (See Appellants' Jurisdictional Statement page 2).



The only question set forth in Appellants' Jurisdictional Statement presented as grounds for an appeal within the jurisdiction of this Court (See Appellants' Jurisdictional Statement page 4) is as follows:

> I. Whether the remedy ordered by the Courts below pursuant to Pa. Stat. Ann. Title 53 §11011 (Purdon) is a judicial usurpation repugnant to the Constitution of the United States of the legislature's portion of the "police power."

Appellants state on page 9 of the Jurisdictional Statement:

> "Since Judge Watson held Pa. Stat. Ann. Title 53 §11011 (Purdon) required such a remedy [the issuance of a building permit] Appellants attacked the validity of the statute."

Appellants make this statement to describe, as they say, "how the Federal questions were raised and decided below."

The statement is not true.

Judge Watson's Opinion and Order nowhere refer to §11011 and he did not hold that §11011 "required" the issuance of a building permit.

A careful reading of §11011 (set forth in full on page 3 of the Jurisdictional Statement) also makes it quite clear that even if Judge Watson had referred to §11011 in his Opinion and Order, he would not have cited this section as "requiring" the issuance of a permit.

The actions authorized in Section (2) of §11011 are clearly *discretionary* on the part of the Court:

> "(2) If the court finds that an ordinance or map or a decision or order thereunder which has been brought up for review unlawfully prevents or restricts a devel-

opment or use which has been described by the landowner through plans and other materials submitted to the governing body, agency or officer of the municipality whose action or failure to act is in question on the appeal, it *may* order the described development or use approved as to all elements or it *may* order it approved as to some elements and refer other elements to the governing body, agency or officer having jurisdiction thereof for further proceedings, including the adoption of alternative restrictions, in accordance with the court's opinion and order." (Emphasis added)

Appellants may be frustrated that a state court in the exercise of its discretion ordered the issuance of a permit.

However, such action does not pose a federal question under 28 U.S.C. §1257(2).

Appellants, in describing "how the Federal questions were raised and decided below" set forth their arguments in their Brief to the Commonwealth Court as to how the Appellants raised the federal questions which bring this case into this Court's obligatory appellate jurisdiction:

II. Fox Chapel Borough's zoning ordinance is valid under the decisions of the Supreme Court of the United States.

[This argument has nothing to do with §11011 or the grounds for jurisdiction of this court under 28 U.S.C. §1257(2). Appellants seek a review by this court of the merits of this case.]

III. The requirements by the Court below that Fox Chapel Borough issue a building permit violates the Constitution of the United States.

[This argument has nothing to do with §11011 or the grounds for jurisdiction of this court under 28 U.S.C. §1257(2). Appellants are dissatisfied with a discretionary judicial decision relating to a non-federal matter.]



Further, Appellants did not assert the invalidity of §11011 in the state trial court in opposition to Respondent's petition for an Order granting a building permit, and consequently, there was no passing on the validity of the state statute cited by the trial court.

In the "Statement of Questions" set forth to the Commonwealth Court of Pennsylvania in the Brief of Appellants (See said questions in Appendix "A" to this Motion), Appellants raised five questions, none of which dealt with the invalidity or validity of the state statute cited.

In the Appellants' Argument to the Commonwealth Court, Appellants did not cite any specific Articles or Amendments of the United States Constitution, nor argue that §11011 was repugnant to specific constitutional provisions (as is suggested in Appellants' Jurisdictional Statement) and required passing on the constitutionality of §11011 by the Commonwealth Court.

Rather, Appellants downplayed and only obliquely mentioned §11011 in the following few sentences in its 45 page brief, that its validity could be questionable:

"...As such, the lower Court's direction to the Borough to issue a building permit is completely contrary to the concept of separation of powers between branches of government which forms the very basis of our Federal and State systems of government. To the extent such court action is condoned by Section 1011(e) of the Municipalities Planning Code, 53 P.S. §11011(2), Appellants' position attacks the validity of that section *as well*." (Emphasis added)

Thus, by this solitary reference to §11011 in a single sentence of Appellants' brief and the casual, afterthought manner of referring to §11011, Appellants claim to have properly drawn in question the validity of this Pennsylvania statute.

The Opinion of the Commonwealth Court, in affirming the invalidity of the municipal zoning ordinance gave, correspondingly, little attention to Appellants' feeble "attack" on §11011:

> "Finally, we find no merit in the Borough's contention that the Court below improperly usurped the Borough's legislative discretion by ordering that a building permit be issued to Friday. Section 1011 of the MPC, 53 P.S. §11011, authorizes courts to give just such relief upon a successful challenge of a regulation."

Indeed the only reference to §11011 in Appellants' 26 page Petition for Allowance of Appeal to the Pennsylvania Supreme Court is the same weak two sentences quoted above from the Argument section of their Brief to the Commonwealth Court.

The Pennsylvania Supreme Court denied Appellants' Petition and, therefore, the purported "Federal question" Appellants assert as jurisdictional ground in this Appeal was never expressly passed upon by the highest court of Pennsylvania.

It is patently clear that these Appellants did not make any claim in the Pennsylvania Commonwealth Court or Supreme Court that §11011 of the Municipalities Planning Code was unconstitutional as they claim to have done by their Jurisdictional Statement.

It is just as patently clear that no Pennsylvania Court intended to or did pass upon the validity and decide in favor of the validity of §11011.

Since the validity of §11011 of the Pennsylvania Municipalities Planning Code was not challenged, properly drawn in question or validity passed upon in accordance with 28 U.S.C. 1257(2) in either the trial court or in the appellate courts of Pennsylvania, no basis exists for this purported appeal.



## III. THERE IS NO SUBSTANTIAL FEDERAL QUESTION

**and**

## THE JUDGMENT OF THE PENNSYLVANIA COURT RESTS UPON AN ADEQUATE NON-FEDERAL BASIS

Appellants seek by their "Additional Grounds of Jurisdiction" set forth on page 3 of the Jurisdictional Statement, questions presented on page 4, "Statement of the Case" on page 5, and the greater portion of the remainder of their Jurisdictional Statement to have this court review this case under its discretionary jurisdiction as would have been presented if Appellants had properly presented a petition for writ of certiorari.

Appellants contend that the judgment below is founded on erroneous interpretation of the United States Constitution, naming the Fifth, Tenth and Fourteenth Amendments to the Constitution of the United States and citing numerous federal judicial decisions.

There has been no erroneous interpretation of such laws by the state court. Essentially there has been no interpretation of such laws at all in this case.

The judgment below rests wholly on state law.

Such state decisions not only cannot be overturned by, but are not even reviewable by this court.

The judgment below is entirely consistent and consonent with an extensive body of Pennsylvania law including *Girsh Appeal*, 437 Pa. 237, 263 A.2d 395 (1970), *Beaver Gasoline Co. v. Osborne Borough*, 445 Pa. 571, 285 A.2d 501 (1971), *Exton Quarries, Inc. v. Zoning Board of Adjustment*, 425 Pa. 43, 228 A.2d 169 (1967) and *Casey v. Zoning Hearing Board of Warwick Township*, 459 Pa. 219, 328 A.2d 464 (1974).

Chief Justice Bell in the *Girsh* case opines that the rights of Pennsylvanians under Article 1, Section 1 of the Constitution of Pennsylvania to own property includes the right to concommitant use of property. The only limitation or restriction thereof was "sic utere tuo ut alienum non laedas"—a right to use one's property in any way and manner and for any purpose the owner desires, except and unless it injures the property of another, or endangers or seriously affects the health or morals or safety of others. However desirable zoning may be or worthwhile its objectives, the exercise of the zoning power by municipalities in Pennsylvania has too "often been carried to an unfair or unwise or unjustifiable extreme, or an extreme which makes the Act or Ordinance illegal or unconstitutional."

As Judge Watson, the trial judge, properly acknowledged in his Opinion: "the rights of the municipality are before the Court." His decision found Fox Chapel's zoning ordinance to have "overreached" the limits of zoning power granted to municipalities under Pennsylvania law.

This case is one of many cases within a category of zoning cases decided by the appellate courts of Pennsylvania which might be termed "exclusionary zoning cases."

The Supreme Court of Pennsylvania has through a series of judicial decisions defined limitations on the exercise of zoning powers within the Commonwealth. The Pennsylvania Supreme Court has held that when a zoning ordinance totally excludes a particular business such as a quarrying operation, from an entire municipality, that ordinance or prohibition must bear a more substantial relationship to the public health, safety, morals and welfare than an ordinance which merely confined that business to a certain area of the municipality.

The Supreme Court has placed the burden upon the municipality which totally excludes a legitimate use to come forward and prove that more substantial relationship.



Fox Chapel failed to carry that evidentiary burden of demonstrating that more substantial relationship. More specifically, Fox Chapel failed to show that its total ban or exclusion of apartments from an area of 8⅓ square miles had a substantial relationship to the prevention of injury to and the preservation of the health, safety, welfare and morals of the community.

The Pennsylvania Supreme Court further refined the police power guidelines with respect to any municipality within the Commonwealth shifting its responsibilities to a neighboring municipality when it ruled that ". . . . the possible availability of alternate sites somewhere outside the municipality on which the totally banned businesses may be conducted does not make permissible the deprivation within the township of property rights imposed by a municipality wide ban of a particular kind of business."

Appellants argue that considerations as to fire, landslide, traffic, sewers and increased municipal outlays are justification to exclude. The Pennsylvania Courts answer that such evidence adduced to show that apartments are not appropriate on the site where a property owner wants to build gives no answer at all as to why there is a total ban on apartments in effect by the municipality.

Municipalities in the Commonwealth of Pennsylvania which totally exclude by their zoning ordinance common residential uses, such as apartment living, are called upon to justify what *public* purpose is served by the regulation of a total prohibition of apartment-type living.

Justifications based upon aesthetics and character of the community are considered by the courts of Pennsylvania to be personal preferences, private desires not rising to the level of public welfare. Zoning regulations may not be employed to effectuate such private desires, if it is at the

expense of excluding other persons the right to live on the land by the municipality-wide prohibition of a legitimate residential use.

The Pennsylvania Supreme Court, as Appellants have acknowledged, have further reiterated Article 1, Section 1 of the Pennsylvania Constitution as the basis for its line of cases relating to exclusionary zoning practices by the municipalities of Pennsylvania. See *Surrick v. Zoning Hearing Board of the Township of Upper Providence*, ___ Pa. ___, 382 A.2d 105 (1977).

In this context, the many decisions of this court argued by Appellants in the Jurisdictional Statement are not depositive of questions regarding rights guaranteed by state constitutions.

Decisions of this court are not mechanically applicable to state law issues.

Only if they are found to be logically pursuasive and well reasoned, paying due regard to precedent and policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting state constitutional guarantees.

Appellants seek to secure from "federal constitutional law" an authority allowing Fox Chapel power to totally ban legitimate uses of land by zoning regulations based upon preservation of the aesthetic qualities of a community.

As Chief Justice Bell points out in the *Girsh Appeal*, "it is sometimes forgotten that very few can ever agree on what is or is not 'aesthetic.'"

However, *Girsh Appeal* made it very clear that zoning is a tool in the hands of governmental bodies which enables them to move effectively, meet the demands of evolving and growing communities. It must not and cannot be used in



Pennsylvania by those officials as an instrument by which they may shirk their responsibilities. Pennsylvania municipalities may not use the zoning power to deny the future. Thus, the Supreme Court of Pennsylvania stated in *Girsh*:

> "...we reaffirm our holding in *National Land* that protecting the character—really the aesthetic nature—of the municipality is not sufficient justification for an exclusionary zoning technique." 419 Pa. at 528-529, 215 A.2d at 610-611.

This matter is one solely of state law and the Federal cases argued by Appellants are not controlling or persuasive.

Appellants argue that a state court, by the issuance of a building permit, "amends" a municipal ordinance contrary to the United States Constitution.

State courts routinely grant building permits when they approve use variances contrary to the zoning district regulations created by municipal legislatures.

State courts routinely declare municipal legislative action in zoning new districts to be invalid as spot zoning.

There is certainly no federal question in a state court declaring a municipal ordinance invalid or in state enabling legislation granting its judicial system discretionary power under §11011 of the Municipalities Planning Code to grant a building permit to a land owner.

How a state structures its internal governance of its municipalities is not a federal question.

As reviewed above, the state judgment in this case rests upon adequate non-federal grounds.

Appellants' arguments that a state court's order to issue a building permit to the Respondent is a usurpation of the legislatures power and repugnant to the Constitution of the

United States and that the Pennsylvania courts have erroneously interpreted the 5th and 14th Amendments to the United States Constitution are frivolous and present no substantial federal question.

In reading the state court's opinion and then the Appellants' Jurisdictional Statement, it becomes clear that the reasons for appeal are fictitious and frivolous and that in effect, Appellants are merely requesting this Court to second-guess the Pennsylvania Court on the merits of the case.

The so-called substantial federal questions Appellants raised in the Jurisdictional Statement are so vague that your Respondent cannot reasonably ascertain what specific questions of constitutional and/or federal law it is called upon to answer under the facts of this case.

Nor has there been presented any special and important reasons for review on writ of certiorari under this Court's discretionary jurisdiction.

For all of the above reasons, the appeal in this case should be dismissed from the overcrowded docket of this Court. There is no valid jurisdiction in this particular case for the Court, Appellants or Respondent to spend time, effort or expense.



## IV. CONCLUSION

Appellants above have sought to bring this unwarranted appeal, and the appeal should be dismissed for lack of jurisdictional requirements with all costs being assessed against Appellants.

IT IS SO MOVED.

Respectfully submitted,

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November 18, 1978

## PROOF OF SERVICE

I hereby certify that I am this day, November 18, 1978, serving a copy of the foregoing Motion to Dismiss Appeal for Lack of Jurisdiction upon the Appellants named below by mailing the same, first class mail, postage prepaid, in compliance with Rule 33 of the Supreme Court of the United States, and that by such service all parties required to be served have been served.

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Dated:
November 18, 1978



## APPENDIX A

## STATEMENT OF QUESTIONS INVOLVED

**(Taken from Appellants' Brief to the Pennsylvania Commonwealth Court)**

Must a municipality's zoning provide for apartment buildings if apartments are readily available in the region of which the municipality is a part?

May a municipality proscribe multi-family uses in a fact situation in which "population pressure" and "fair share of growth" theory suggest no need for such uses?

May a court substitute its legislative determination for that of an elected municipal legislative body?

How is a municipality to resolve the differing guidelines set up in zoning matters by the courts of Pennsylvania and the U. S. Supreme Court?

Do the interests of the vast majority of the citizens of a municipality in zoning consistent with those U. S. Supreme Court guidelines rise to the level of federal constitutional rights which are infringed by the state courts?